

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

77-4079

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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NEW YORK STATE COMMISSION ON
CABLE TELEVISION,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.
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Docket No. 77-4079

REPLY BRIEF FOR PETITIONER

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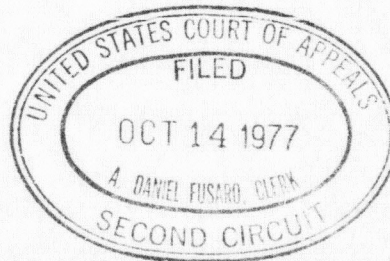


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REPLY BRIEF OF PETITIONER

A.

Nothing in the briefs of the FCC or intervenors overcomes the wording the FCC itself chose to employ in its regulation -- wording which expressly applies to systems, not individual fees.

Although the intervenors and amazingly even the FCC itself now attempt to laugh off the plain meaning of these words as "illogical" (Cable Assn. Br. p. 16), "a distortion" (FCC Br. p. 10) and indeed "nonsensical" (id. p. 14), the record reveals that the wording exempting systems, not fees, was intentionally chosen and is an integral part of the FCC's approach to cable-television regulation. The grandfathering of existing franchises in § 76.31(b) was imposed by the FCC, not the states. It was done to

protect not states or municipalities but the companies themselves.

State fees could scarcely have been at issue in 1972 when the FCC enacted § 76.31(b), since no state regulatory commission even existed then in the cable-television area. It was municipal franchise fees which the FCC desired to limit for the benefit of the companies, and the FCC declared the specific purpose of grandfathering was to avoid municipalities auctioning off franchises to the highest bidder or siphoning franchise fees off for general municipal purposes. These laudable reasons, however, have nothing to do with the State Commission and plainly should not be used as an excuse for giving the wording of the rule at bar a reading at odds with its plain language which would hamstring the State's regulatory program. It is fundamental that "[w]here the words of a statute are unambiguous, as here, it is unnecessary to speculate about legislative intent."

Strachan Shipping Co. v. Hollis, 323 F.Supp. 1122, (S.D. Tex. 1970), cert. den. 409 U.S. 887, reh. den. id. 1002.

The irony of the result sought here by the respondents is evident. The very purpose of the State Commission is to prevent the same abuses which rightly concerned the FCC -- the lack of standards and criteria in franchising by municipalities and the need to protect the industry "from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically

and technically feasible; * * *." Exec. Law § 811
(Declaration of legislative findings and intent).

The State Commission was explicitly given regulatory jurisdiction to "prescribe standards for procedures and practices which municipalities shall follow in granting franchises," including public bidding, written reports by the municipality "setting forth the reasons for its decision in awarding the franchise" (Exec. Law § 815[2][a]) and including public participation (id.; § 821). The State Commission may set aside rates charged the public which are preferential or discriminatory (§ 825).

Thus the concern shown by the FCC that its new interpretation of its rule is required to protect the public is misplaced. It is the companies, not the public, which receive the benefits of grandfathering, and the FCC is free to do away with the entire grandfathering rule if it sees fit.

The spectre of rapidly increasing state fees is raised here as if it had some basis in fact. In reality the statutory fee in New York is fixed at the minimum amount sufficient to defray the Commission's expenses, and may in no event exceed 2% of any company's gross revenues (§ 817). This amount is far less than most municipal franchise fees, and unlike some municipalities the State of New York is barred by statute from using these fees for any purpose other than regulation of the industry (§ 817). It would take an act of the Legislature to increase the fees which the State Commission

may charge -- an amendment to the Executive Law which the Commission does not envisage in the foreseeable future. This "specter of possible 'horribles'" should be ignored. The court is "only called upon to decide this specific case." Lee Fook Chuey v. Imm. & Nat. Service, 439 F.2d 244, 249 (9th Cir. 1971).

The FCC brief concedes that the rule was enacted not to limit the states but rather because of "evidence that some municipalities were exacting exorbitant fees from cable systems far in excess of the costs of their regulation" (p. 4). We have seen that the State Commission shares that concern, as evidenced by the legislative finding in § 811, "while said operations must be subjected to state oversight, they must also be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this State as rapidly as economically and technically feasible"). As our main brief points out, § 818 limits the maximum combined fee of the State Commission and the municipality to an amount no greater than that allowed under federal law. In fact the likelihood is that the State's fee will be reduced rather than increased since it is limited to reimbursement of Commission expenses, and those expenses, now that first-instance costs of equipment and the like have been met, will now diminish.

The State's reference to FCC regulation commencing in 1972 (see FCC Br. p. 3, fn. 2) was to regulation of franchises. The earlier federal regulations dealt with signals and other mechanical matters. The FCC's other

objection -- that its rule is "necessary to prevent frustration of federal objectives" (id.) -- is not borne out by the facts. The FCC has no direct jurisdiction over the states' regulatory agencies and under our federal system cannot function as a general supervisor of state agencies' acts. The amount of the fee a state sets to defray the expenses of its regulatory agency is, at least in the absence of facts utterly unlike those at bar, not a matter for the FCC. It must be presumed that the FCC, in enacting its rule, knew the import of its words and did not intend that another meaning be ascribed them.

What "federal objective" (in the words of the FCC's brief) would be thwarted by giving the words of the FCC's rule their manifest meaning? Certainly not the limitation of fees, for we have seen that the State's 2% fee is far less than those charged by municipalities without FCC objection. Certainly not any desire on the part of the FCC to closely control franchises -- for in its recent Report and Order (Docket 21002, decided Sept. 30, 1977) it abdicated control over franchises in every respect save this. In fact the FCC must have meant what it said, and far from amending its rule to have it say what it now urges, as it is free to do, in Docket 21002 it extended the time during which systems are grandfathered to 15 years from the date of the franchise (unless the franchise sooner expires by its terms).

Although the FCC shrugs off its expansion of the permissible franchise fee base (Br. p. 4, fn. 3) as unrelated to this case, it is further evidence of its move away from regulation of state and municipal fees and of the irrationality of the construction with which it now saddles § 76.31(b). It is a cardinal canon that statutes and by extension rules should not be interpreted in ways which lead to such an absurd result. See Voris v. Eikel, 346 U.S. 328, 333 (1958); Lee Fook Chuey v. Imm. & Nat. Service, supra, 439 F.2d 244, 249. If the rule at issue here were genuinely part of a comprehensive FCC scheme to closely control state and municipal fees, its belated interpretation, even though contradictory to its actual language, might at least be philosophically consistent. As it is, it lacks even that quality.

B.

It is contended that the State Commission is "estopped" from stating the obvious -- that the FCC should have amended its rule via a rule-making proceeding and not by ipse dixit. The short answer is that the State Commission asked the FCC to do just that in its petition for reconsideration (A. 36):

"In view of the fact that the instant proceeding represents the first instance in which the [FCC] has ruled upon this issue, this issue should have [been] given more careful consideration, or perhaps treated in a separate proceeding." (Emphasis in original.)

The State Commission was not free to institute a rule-making proceeding here. The novel interpretation of the rule was given by the FCC in its response to a petition by the State Commission on other subjects, in which it ruled in the State's favor. The State then petitioned for reconsideration, using the language above quoted. It would be an empty formalism indeed which would argue that the State had thereby waived its opportunity to suggest that a rule-making proceeding would be more appropriate.

There is no question, however, that a rule-making proceeding would provide opportunity for full public participation such as the FCC itself recently furnished in Docket 21002, in which franchise standards were deleted and the fee limitation of § 76.31(b) increased by changing the criterion from gross subscriber revenue to gross revenue from all sources. Thus, although the FCC and companies describe themselves as champions of the subscribers, in point of fact the FCC allowed greater franchise fees and in addition extended grandfathering from 1978 to the end of 15 years from the franchise. In that proceeding the FCC candidly noted that the 1976 Congressional Report^{*} found "fee regulation was not a matter of federal concern" (p. 19). The Report and Order also notes (p. 29) that

^{*} See our main brief at p. 6.

"the growth of pay cable during the past few years has been robust, and we anticipate that such healthy development will continue notwithstanding the adoption of an expanded fee base."

The FCC's decision to deprive the State Commission of substantial revenues to meet its costs, notwithstanding the wording of its own rule, is startling when one considers the abdication by the FCC of responsibility over the award of franchises. See the dissent of Commissioner Washburn in Docket 21002, supra. The New York Commission requires, and supervises, the very same procedural matters which the FCC abandoned -- public hearings prior to awarding franchises, and complaint procedures, for example. The clamorous insistence of the industry that the FCC's new gloss on its rule is correct portrays the insistence of that agency that it is acting to protect the public in its true perspective.

C.

The Association's brief suggests that New York's "interpretation" -- actually the very words of the rule -- would open the door to grossly excessive fees" (Br. p. 5). We have pointed out the highly speculative nature of any claim that State fees would increase. And franchise fees are a matter of contract between municipality and company.

The State Commission was fully aware of the

problem of excessive franchise fees. The words of former Public Service Commissioner Jones and Chairman (then Assemblyman) Kelly (Assn. Br. p. 6) were before the Legislature and the Commission, and utterly discount the in terrorem argument of the Association. See also the New York Commission's comments on FCC Docket 21002, quoted by the Association (p. 7, fn.), showing it "opposed to excessive franchise fees * * *." It is fantastic to now paint the New York Commission as an advocate of higher fees and the FCC, which has extended grandfathering another decade in some cases in Docket 21002, as their opponent.

Manhattan Cable's brief raises another spectre which merits brief discussion. It argues (pp. 22-23) that the State Commission seeks "the unilateral right to terminate [its] grandfather rights * * * and force * * * a negotiated reduction in fees payable to the City." On the contrary we simply contend the rule the FCC adopted grandfathers systems and that a 180-degree reversal of that rule should be done forthrightly by amendment of the rule.

The courts have consistently held that language unambiguous on its face is not subject to construction and should be read as written. Jones v. Alfred H. Mayer Co.,

392 U.S. 409, 420 (1968); United States v. Dickenson, 310 U.S. 554, 562 (1940):

"Legislative materials may be without probative value, or contradictory, or ambiguous, * * * and in such cases will not be permitted to control the customary meaning of words * * * or construction found by experience to be workable."

The validity of this rule and the common sense behind it apply whether it is a statute or a regulation of an administrative agency before the court. Rucker v. Wabash R. Co., 418 F.2d 146, 149 (7th Cir. 1969).

It is "a well-established precept that governmental agencies must scrupulously conform to their own rules ***." Mandel v. U.S. Dept. of H.E.W., 411 F.Supp. 542, 554 (D. Md. 1976), citing Service v. Dulles, 354 U.S. 363 (1957); see also United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1970):

"An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."

In similar cases this and other federal courts have repeatedly barred agencies from scuttling or ignoring their

own regulations. Gardner v. FCC, 530 F.2d 1086, 1089 (D.C. Cir. 1976); Save the Courthouse Committee v. Lynn, 408 F.Supp. 1323, 1338 (S.D.N.Y. 1975).

It is impossible for the FCC or intervenors to argue persuasively that the FCC is not bound by the plain meaning of its own rule. See Whelan v. United States, 529 F.2d 1000, 1002 (Ct. Cl. 1976):

"The 'plain meaning' rules of statutory construction apply to the interpretation of administrative regulations [citing cases]. The terms of the applicable administrative regulation * * * are clear in this case. We hold that the agency erred in ignoring the express language."

Again, in Francis v. Davidson, 340 F.Supp. 351, 368 (D. Md. 1972), aff'd 409 U.S. 904, the 3-judge court held:

"The principle which accords weight to an agency's interpretation of its own regulation is inapplicable insofar as that interpretation is inconsistent with the requirements (in this case, mandatory requirements) of its own regulation validly promulgated under authority delegated to it by the Congress."

Much is made here of the weight to be given the agency's own interpretation of its regulation. But that presumption "is not absolute. The interpretation must be within the bounds of reason and not inconsistent with the regulation itself." D.C. Fed. of Civic Assns. v. Volpe, 316 F.Supp.

754, 785 (D.D.C. 1970), rev'd on other gds., 459 F.2d 1231, cert. den. 405 U.S. 1030. A strained construction, as here, at variance with the explicit language of the regulation itself, will be rejected by the courts. United States v. Westland Oil Co., 228 F.Supp. 85, 88 (D.N.D. 1964). As the Supreme Court recently held in Shea v. Vialpando, 416 U.S. 251, 263, "the sound principle of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible of differing interpretations." In that case, as here, the plain wording led to a result other than that suggested by the agency, and the Court held "we need not look to agency practice in this case." id.

The court may not ignore a sentence "grammatically capable of independent significance." United States v. Great Northern Ry. Co., 343 U.S. 562, 571 (1952). Long ago, in a paragraph relied on by courts to this day, the Supreme Court wrote:

"It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation.
* * * [I]n most cases, the plain meaning of a provision not contradicted by any other provision in the

same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 4 Wheat. (17 U.S.) 122 (1819)· see Sutherland, Statutory Construction (4th Ed.), § 46.04.

Here, the FCC's purpose in enacting the rule coincides with its plain meaning. Its attempt to jettison it now should not receive judicial approval.

CONCLUSION

THE RULING OF THE FCC SHOULD BE
ANNULLED, WITH COSTS.

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October 13, 1977

Respectfully submitted,

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